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Attorneys for Cynthia Renee FallHowe, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

De'Vonne Gonzales, on behalf of Aaron
Salter's surviving beneficiaries, and as
Personal Representative of the Estate of
Aaron Salter, deceased,

Plaintiff,

v.

Corizon Health, Inc., Corizon, LLC, Murray
Young, James Baird, Renee Fallhowe, Leo
Easley, Ryan Diaz, ASPC-Tucson Site
Medical Director, and all Unknown
Agents/Employees of Corizon Health, Inc.
and/or Corizon, LLC responsible to treat,
monitor, and/or refer Aaron Salter for

Case No.: 2:19-cv-02190-PHX-JJT-CDB

**DEFENDANT CYNTHIA RENEE
FALLHOWE'S REPLY IN SUPPORT
OF HER MOTION FOR SUMMARY
JUDGMENT**

{ORAL ARGUMENT REQUESTED}

(Assigned to Honorable John J. Tuchi)

1 treatment whose authority and/or identity
 2 becomes known,
 3 Defendants.

4 Pursuant to Federal Rules of Civil Procedure 56, Defendant Cynthia Renee FallHowe,
 5 M.D., by and through undersigned counsel, submits this Reply memorandum in further support
 6 of Defendant Cynthia Renee FallHowe's Motion for Summary Judgment (*Dkt.182*). This Reply
 7 is based on all pleadings, motions, responses and replies thereto, other documents filed in this
 8 case, as well as records filed and other oral and documentary evidence associated with this matter,
 9 all of which are herein incorporated by reference. Dr. FallHowe was not involved in the care and
 10 treatment of the decedent and Plaintiff cannot establish a causal link between the alleged
 11 negligence of Dr. FallHowe and the decedent's death. As such, judgment should be granted in
 12 her favor.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 Plaintiff's Response (*Dkt. 198*) does a few remarkable things. First, it concedes key facts
 16 in support of Dr. FallHowe's Motion for Summary Judgment. Next, the Response inaccurately
 17 states that certain material facts are disputed, but fails to show how they are disputed. Lastly,
 18 Plaintiff's Response astonishingly fabricates facts. Plaintiff improperly attempts to lump Dr.
 19 FallHowe, Corizon's Chief Medical Officer, in as one of the day-to-day healthcare providers who
 20 were actually directly involved in the care and treatment of Mr. Salter. Plaintiff also improperly
 21 implies that the comments they cited from the Arizona Medical Board's April 15, 2010 meeting
 22 were directly toward Dr. FallHowe, which is simply untrue. The Arizona Medical Board took no
 23 action against Dr. FallHowe and found no standard of care violations on her part. Ultimately,
 24 Plaintiff's Response fails to show a genuine dispute of material fact and as such, summary
 25 judgment should be granted in Dr. FallHowe's favor.

26 The material facts remain undisputed. The Parties agree that Dr. FallHowe was not directly
 27 involved in the care of patients at the Arizona Department of Corrections (hereafter "ADOC").
 28 The Parties also agree that the first time Dr. FallHowe was even made aware of Mr. Salter's

1 situation was at the end of May 2017, specifically May 26, 2017, which is just shy of 60 days
2 before Mr. Salter's death. Plaintiff claims that Dr. FallHowe was negligent for failing to ensure
3 that Mr. Salter was sent urgently to urology and failed to use her override authority to ensure a
4 more timely referral, but ignores the fact that she was not presented with the opportunity to utilize
5 her override authority and did in fact try to get him seen by a urologist sooner. Plaintiff agrees
6 that Dr. FallHowe was not personally involved in Mr. Salter's care until May 26, 2017. Plaintiff
7 does not dispute that Dr. FallHowe instructed the providers at ASPC-T Santa Rita to appeal the
8 case so that she could review the Alternative Treatment Plan ("ATP") and original treatment plan
9 proposed by the provider and approve one of the plans. Plaintiff also does not dispute that there
10 is no evidence that Dr. FallHowe received an appeal request relating to Mr. Salter being seen by
11 an urologist that she denied. In short, Plaintiff cannot establish that Dr. FallHowe did anything to
12 delay the medical care of the decedent, and rather, she only tried to speed up the process of getting
13 Mr. Salter seen by appropriate specialists.

14 Plaintiff's Controverting Statement of Facts (*Dkt. 199*) inaccurately states that certain
15 material facts are disputed, but fails to show how they are disputed. The first example of this is
16 Plaintiff's attempt to dispute that Dr. FallHowe promptly responded to communications regarding
17 Mr. Salter. Plaintiff attempts to dispute by referencing an override capability that Dr. FallHowe
18 allegedly failed to use; however, this controverting statement does not directly address that Dr.
19 FallHowe did indeed respond promptly to communications regarding Mr. Salter. Thus, this fact
20 remains undisputed.

21 More baffling is Plaintiff's attempt to dispute that a germ-cell tumor is one of the fastest
22 growing types of cancer that can rapidly progress from localized to metastatic disease. Plaintiff
23 again tries to dispute this material fact by changing the subject and addressing the survival rates
24 on different stages of testicular cancer. None of Plaintiff's factual material cited disputes that a
25 germ-cell tumor is one of the fastest growing types of cancer, so again, Plaintiff's "dispute" is not
26 supported by factual material. This fact too, remains undisputed despite Plaintiff's conclusory
27 statement to the contrary.

28 Lastly, Plaintiff once more attempts to improperly dispute that their own expert, Dr. Kern,
acknowledged that Dr. FallHowe requested another urologist be found because she was not

1 satisfied about the timing of Mr. Salter's then scheduled urology appointment. This time, Plaintiff
 2 "disputes as incomplete," citing once more an override authority that Dr. FallHowe allegedly
 3 failed to use. This again does not specifically address and establish a dispute of the fact that Dr.
 4 Kern acknowledged this act by Dr. FallHowe. This attempt to dispute as "incomplete" is yet
 5 another conclusory statement unsupported by factual material. Thus, it remains undisputed that
 6 Plaintiff's expert, Dr. Kern, acknowledged that Dr. FallHowe requested another urologist be found
 7 because she was not satisfied about the timing of Mr. Salter's then scheduled urology
 8 appointment.

9 These attempts by Plaintiff to create a genuine dispute as to Dr. FallHowe's role in this
 10 case and the death of Mr. Salter completely fail. Short of picking apart each of the several
 11 inaccuracies of Plaintiff's Response, these instances above show that there is no genuine dispute
 12 of material fact. Plaintiff attempts to cherry pick only the portions of the facts which they like
 13 while ignoring those that do not support their case against Dr. FallHowe.

14 **II. LEGAL ARGUMENT**

15 A court must grant summary judgment "if the movant shows that there is no genuine
 16 dispute as to any material fact and the movant is entitled to a judgment as a matter of law."
 17 Fed.R.Civ.P. 56(a). Under summary judgment practice, the moving party bears the initial
 18 responsibility of presenting the basis for its motion and identifying those portions of the record,
 19 together with affidavits, that it believes demonstrate the absence of a genuine issue of material
 20 fact. *See Celotex*, 477 U.S. at 323; *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en
 21 banc).

22 If the moving party meets its burden with a properly supported motion, the burden then
 23 shifts to the opposing party to present specific facts that show there is a genuine issue for trial.
 24 Fed.R.Civ.P. 56(c)(4) and 56(e); *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995); *see*
 25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The opposing party need not establish
 26 a material issue of fact conclusively in its favor; it is sufficient that "the claimed factual dispute
 27 be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."
 28 *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968). But conclusory
 allegations, unsupported by factual material, are insufficient to defeat a motion for summary

judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; 11 *11 *Devereaux*, 263 F.3d at 1076.

In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995). If the evidence of the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

A. Plaintiff has not established a causal link between Dr. FallHowe's role as Chief Medical Officer and Mr. Salter's death.

Despite Plaintiff's attempts to distract from the issues, Plaintiff fails to show an act or omission on the part of Dr. FallHowe that lead to causing or contributing to causing Mr. Salter's death. Plaintiff must demonstrate "a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." *Barrett v. Harris*, 207 Ariz. 374, 86 P.3d 954 (Ariz. App. 2004). This intervening cause has to be "an independent cause that occurs between the original act or omission and the final harm and is necessary in bringing about that harm." *Id.* Finally, unless the connection is "readily apparent," the plaintiff must show connection through expert medical testimony. *Id.*

In Plaintiff's Response, Plaintiff half-heartedly argues that the causal connection between Dr. FallHowe's alleged acts or omissions is readily apparent and as such, expert testimony is not required. But this is simply not the case here. If this Court were to consider this connection as readily apparent, the Parties would be relying on the jury to understand the different stages of germ-cell tumors, when Mr. Salter's metastatic cancer progressed to which stage, and whether Dr. FallHowe could have done anything to prevent Mr. Salter's rapidly progressing disease when she was finally made aware of it at the end of May 2017. Those things obviously exceed the knowledge of lay people and as such require expert testimony. The requirement for expert testimony is tailor-made for a case such as this one and Plaintiff has failed to deliver an expert to testify that the required causal nexus exists between any action or inaction of Dr. FallHowe and

1 Mr. Salter's unfortunate death.

2 As if acknowledging that expert testimony is in fact required, Plaintiff cited to the
3 testimony of their retained experts, but still failed to establish a causation connection between Dr.
4 FallHowe's alleged negligence and the death of Mr. Salter. What is even more troubling is that
5 Plaintiff's counsel actually blatantly mischaracterizes the testimony of their oncology expert, Dr.
6 Freidlander. In bold Plaintiff's counsel states that "Dr. Friedlander further testified Aaron's
7 cancer was left untreated for so long it spread to his brain and that the spread was recent in August
8 2017." However, the actual testimony by Dr. Friedlander that was directly quoted below clearly
9 shows that Dr. Friedlander said that the very small brain metastases "happened within the recent
10 month." (*Dkt. 198*, page 7, line 6, through page 8, line 6). Contrary to Plaintiff's assertions,
11 expert testimony is required and the testimony that Plaintiff provided falls far short of establishing
12 a causation connection between Dr. FallHowe's alleged negligence and the death of Mr. Salter.
13 As such, Plaintiff's wrongful death claim against Dr. FallHowe must fail.

14 ***B. Plaintiff cannot establish deliberate indifference against Dr. FallHowe.***

15 Plaintiff's claim for deliberate indifference is nothing short of a desperate attempt to lump
16 in one more medical professional to the claim. Despite an unjustifiable attempt to create a material
17 fact that does not exist, the deliberate indifference claim as to Dr. FallHowe remains vague and
18 subject to summary judgment. As cited in Plaintiff's Response, to establish deliberate indifference
19 when there are numerous defendants involved, "(t)he prisoner must set forth specific facts as to
20 each individual defendant's deliberate indifference." *Leer v. Murphy*, 844 F.2d 628 (9th Cir.
21 1988). "(I)solated occurrences of neglect do not amount to a constitutional violation." *O'Loughlin*
22 *v. Doe*, 920 F.2d 614 (9th Cir. 1990).

23 Here, to justify the claim of deliberate indifference against Dr. FallHowe, Plaintiff outright
24 mischaracterizes a fact in the statement of facts. Plaintiff claims that Dr. FallHowe "interfered"
25 with Mr. Salter's care by instructing NP Easley to write a note denying Mr. Salter's reported pain
26 out of fear of Dr. Robertson's involvement. This is a dangerous misrepresentation to the Court.
27 At first glance, it looks like Dr. FallHowe could have had some ill-intent or something closer to
28 what is required in a U.S.C. § 1983 claim, but Plaintiff does not paint the full picture. Dr.

1 FallHowe was merely asking NP Easley to write a note reiterating what NP Easley told Dr.
2 FallHowe. With Plaintiff's misrepresentation in mind, it is important to directly quote NP Easley:

3 This patient pain is not a 9/10 he states its (sic) a 9 but his behavior is not consistent
4 with his score. He is very calm and relaxed/jovial... He is doing well at this time
and will continue to monitor his pain and his behavior.

5 (*Dkt. 199-2*, at p.36). In response to this, Dr. FallHowe stated:

6 Would you add a note that indicates that his complaints are not consistent with his
7 behavior and your observations. Dr. Robertson is all over this... This is a case that
we need to send to another urologist to have completed within 60 days.

8 (*Dkt. No. 199-2*, at p. 38). Full transparency of this interaction shows that Dr. FallHowe was
9 merely asking NP Easley to write a note reflecting NP Easley's observation that Mr. Salter's
10 subjective pain level of 9/10 was not consistent with his behavior during the subject visit. This is
11 not anything close to the wicked act that Plaintiff tries to characterize in Plaintiff's Response. In
12 fact, there is nothing unusual, let alone nefarious, about Dr. FallHowe's instruction to NP Easley
13 or his observations about Mr. Salter during the visit. Health care providers are trained to use their
14 own judgment and objective evidence to determine the validity of patient's subjective complaints.

15 Plaintiff's attempt to twist the facts aside, Dr. FallHowe is not even alleged to have actually
16 taken affirmative action or failed to take action that actually harmed the decedent. The undisputed
17 material facts are that Dr. FallHowe was first made aware of Mr. Salter's situation at the end of
18 May 2017, and from that point on, she never denied an appeal request relating to Mr. Salter's care
19 and always promptly responded to inquiries from Dr. Robertson about Mr. Salter's situation and
20 did whatever was asked of her to help facilitate getting him an earlier appointment for specialty
21 care. Sadly, by the time Dr. FallHowe was asked to intervene, the dye was already cast and there
22 was nothing that she could have done to change the ultimate outcome. Plaintiff's own expert
23 acknowledged that Dr. FallHowe was not satisfied about the timing of Mr. Salter's urology
24 appointment and requested another urologist be found. Plaintiff's expert also recognized that Dr.
25 FallHowe was prompt in responding to e-mails regarding Mr. Salter. None of these undisputed
26 material facts rise to conduct by Dr. FallHowe that shows a purposeful act or failure to respond to
27 Mr. Salter's pain or possible medical need. Thus, Plaintiff's deliberate indifference claim against
28 her must fail.

1 **III. CONCLUSION**

2 For Plaintiff's Response to conclude with a bible verse is the very definition of irony when
 3 his pleading is filled with intentional mischaracterizations and misrepresentations of the evidence
 4 in an improper attempt to defeat Dr. FallHowe's Motion for Summary Judgment. For the
 5 foregoing reasons, Defendant Cynthia Renee FallHowe, M.D. respectfully asks this Court to grant
 6 summary judgment in favor of her on all claims. Plaintiff has failed to establish a genuine dispute
 7 of material fact in the claims against Dr. FallHowe. Despite mischaracterizing facts, the material
 8 facts remain undisputed and Plaintiff has failed to show that there is a causal connection between
 9 Dr. FallHowe's role in this case and Mr. Salter's death. Similarly, Plaintiff has failed to show
 10 deliberate indifference as to Dr. FallHowe. As such, Dr. FallHowe respectfully requests that this
 11 Court grant summary judgment in her favor.

12 RESPECTFULLY SUBMITTED this 26th day of February, 2021

13
 14 WICKER SMITH O'HARA McCOY & FORD, P.A.

15 By: /s/Mandi J. Karvis

16 Mandi J. Karvis

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20 *Attorneys for Cynthia Renee FallHowe, M.D.*

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on February 26, 2021, I electronically transmitted the attached
 23 document to the Clerk's Office using the CM/ECF System for filing thereby transmitting a Notice
 24 of Electronic Filing to all CM/ECF registrants.

1 I hereby certify that on February 26, 2021, I served the attached document via e-mail on
2 the following:

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